IN THE

# Supreme Court of the United States

October Term 1942

No. 469

GENERAL AMERICAN LIFE INSURANCE COMPANY,

*Petitioner,*

*vs.*

MERCY BROWN STEPHENS,

*Respondent.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

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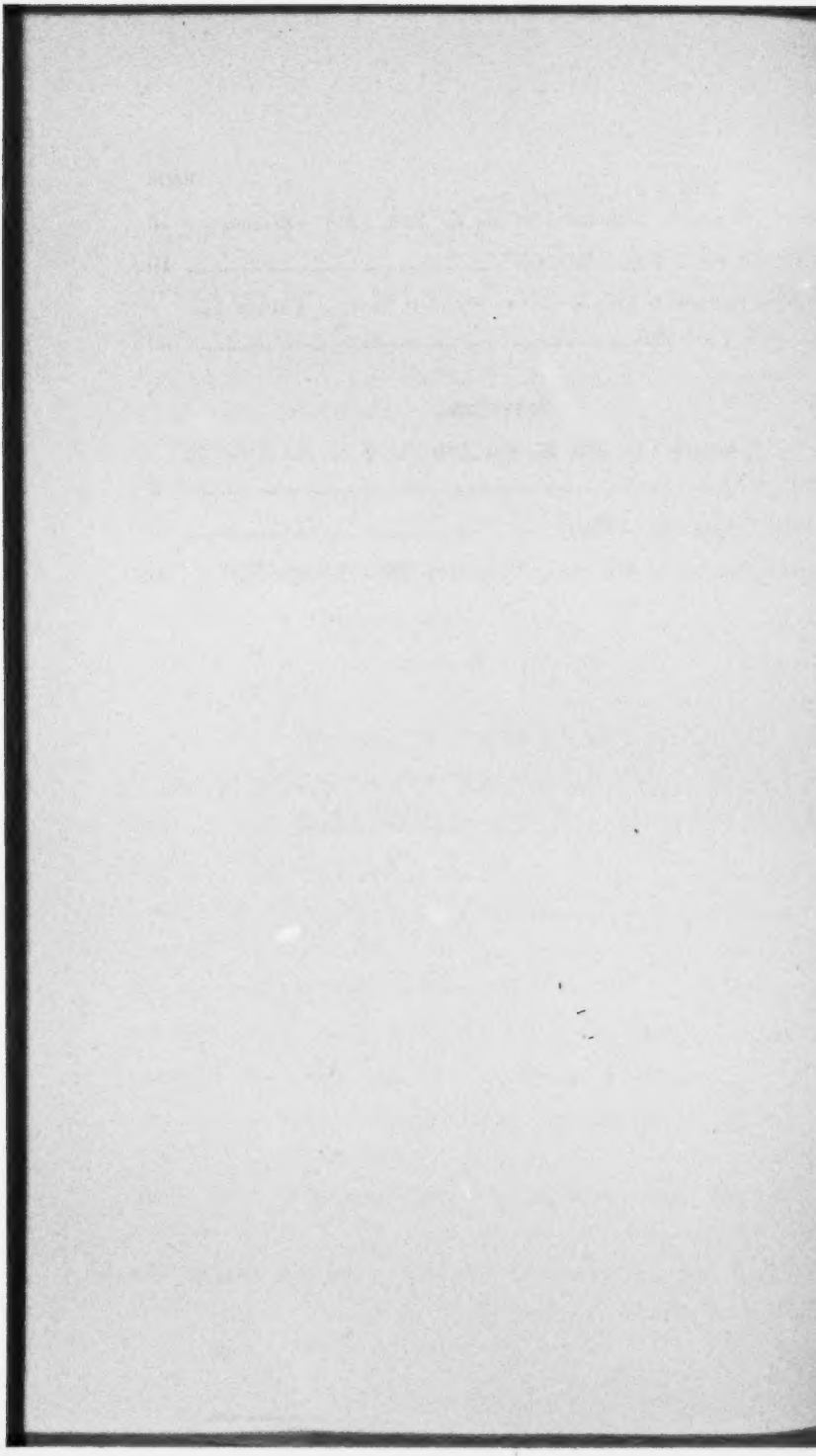

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GENERAL AMERICAN LIFE INSURANCE COMPANY,

*Petitioner,*

*vs.*

MERCY BROWN STEPHENS,

*Respondent.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered July 17, 1942, reversing the judgment of the District Court for the Southern District of California, Central Division, and directing said District Court to render judgment *nunc pro tunc* of date September 26, 1940, for $9,777.14.

## Opinions Below.

The Circuit Court of Appeals has written two opinions. The first opinion was filed June 27, 1941, and is reported in 121 Fed. (2d) 218. This opinion is also reproduced in the Appendix to this petition, and in the transcript of record [R. 766].

The second opinion, filed July 17, 1942, has not yet been reported. It appears in the transcript of record [R. 785] and also in the Appendix hereto. A petition for rehearing was filed by petitioner and was denied on September 8, 1942 [R. 793].

## Basis of Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347.

2. The date of the rendering and filing of the opinion of the Circuit Court of Appeals petitioned to be reviewed [R. 791] and of the entering of the judgment based thereon [R. 794] is July 17, 1942.

3. A petition for rehearing was "filed August 15, 1942, and within the time allowed therefor by rules of court," and was denied on September 8, 1942 [R. 793].

4. Order staying issuance of mandate to and including October 13, 1942, and thereafter in the event petition for writ of certiorari be docketed, until the Supreme Court passes thereon, was signed by Honorable Curtis D. Wilbur, Senior Circuit Judge, and filed September 8, 1942 [R. 794].

5. An extension of said order to and including October 23, 1942, was signed by Honorable William Denman, Circuit Judge, and filed September 28, 1942 [R. .....].

6. This petition for writ of certiorari was filed on the ..... day of October, 1942, in accordance with the provisions of the order staying mandate and extension of time thereon.

7. The following cases are believed to sustain the jurisdiction of this Court to grant certiorari:

*Erie Ry. Co. v. Tompkins,* 304 U. S. 94;

*Stoner v. New York Life Ins. Co.,* 311 U. S. 464;

*Six Companies v. Highway Dist.,* 311 U. S. 180.

**Summary Statement of Matters Involved.**

This action, a suit of a civil nature at common law, between citizens of different states, was begun by the filing of the complaint in the Superior Court in the State of California, in and for the County of Los Angeles, wherein plaintiff, the respondent herein, sought to recover of the defendant, the petitioner herein, the sum of six thousand nine hundred fifty dollars ($6,950.00); thereafter defendant caused the same to be removed to the United States District Court, Southern District of California, Central Division; all in due course and in accordance with law [R. 16-25].

The basis of said action is a preliminary term non-participating twenty-payment life insurance policy in the face amount of ten thousand dollars ($10,000.00), issued in Los Angeles, California, on or about March 20, 1925, by the International Life Insurance Company of St. Louis,

Missouri [Plaintiff's Exhibit 1, R. 175-201]. In the policy it was stated that:

> "This policy is issued on the New Triple Option Guaranteed Premium Reduction Plan"

and included in the policy were certain coupons, the use of which was confined to the following options:

> "Option 1. The Insured may use the amounts designated in the coupons hereto attached for the reduction of his premium payments from year to year.
>
> Option 2. The Insured may elect to pay all premiums without reduction, in which case the Company guarantees that, after payment of premiums in full for 16 years and surrender of this policy duly discharged and all attached coupons to the Company, a policy paid-up for life for the face amount hereof, granting excess interest dividends. will be issued, If the available cash value and coupon accumulation is in excess of the net single premium for such paid-up insurance according to the American Experience Table of Mortality and interest at the rate of three and one-half per cent per annum, such excess shall be paid in cash to the Insured.
>
> Option 3. The Insured may elect to pay all premiums without reductions, in which case the Company guarantees that this policy shall mature as an endowment after paying the premiums in full for 18 years; and, upon surrender of this policy duly discharged and all attached coupons on the first anniversary of this policy after such payments are completed, the face amount of the policy less any indebtedness to the Company, will be paid in cash. If the available cash value and coupon accumulation is in excess of the face amount of the policy, such excess shall be paid in cash to the Insured.

In case the Insured shall pay all premiums in full, without coupon reduction, the unused due coupons shall be placed to the credit of the policy and shall be payable at any time, together with compound interest at the rate of three and one-half per cent per annum for each full year after due dates thereof; or, in the event of the death of the Insured said amount shall be payable to the beneficiary in addition to the face amount of the policy.

Accumulated value of coupons, at the end of 5th Yr. $533.30, 10th Yr. $1401.40, 15th Yr. $2532.20, 20th Yr. $3975.10." [R. 196.]

Each of the coupons included in the life insurance policy provided:

"On or at any time after ..... $..... International Life Insurance Company, St. Louis, Mo., will pay to the order of the insured under Policy 156284 (or to the order of the assignee if said policy is assigned) 181.80 dollars subject to conditions of said policy, provided all premiums due on said Policy up to and including said date have been paid. No. ..... Payable at its Home Office.

J. R. PAISLEY
President."

The coupons were for increasing amounts, ranging from $117 due and payable March 20, 1926, to the final coupon due and payable March 20, 1944, in the amount of $181.80, one such coupon falling due each year on the policy anniversary date.

Prior to September 1, 1933, all policy obligations of the International Life Insurance Company were reinsured by the Missouri State Life Insurance Company, hereafter called Missouri State [R. 4].

Under date of August 26, 1933, the Superintendent of Insurance of the State of Missouri (hereafter called Superintendent), proceeding under Sections 5940 through 5951 of Revised Statutes of Missouri, 1929, filed his petition for a decree declaring the Missouri State to be insolvent, and to enjoin it from doing further business [Defendant's Exhibit D, in evidence, R. 544; Petition, R. 547-549].

On the 28th day of August, 1933, said petition was granted and the Superintendent was vested with title to the assets and custody of the books and records of the insolvent company [Defendant's Exhibit D, R. 551-553].

On September 7, 1933, the assets of the insolvent company were under decree of court, sold to this petitioner [Defendant's Exhibit D, R. 553, *et seq.*]. The terms of said sale were set forth in the decree in the form of a contract between this petitioner and the Superintendent, which contract was entitled "Purchase Agreement" [Plaintiff's Exhibit 2, in evidence, R. 205, Exhibit, R. 209-250].

Article I of the so-called Purchase Agreement provided for the sale by the Superintendent, of all of the assets of the then defunct Missouri State to the petitioner, General American Life Insurance Company (hereinafter called General American), and the latter company agreed as consideration for such sale, to pay the sum of one hundred thousand dollars and such other sums as would be necessary to pay preferred claims in full, secured creditors to the extent of the value of their security, and fifty per cent of all other claims against the said Missouri State [R. 210].

Article II and subsequent articles of the Purchase Agreement provided that the General American would assume all of the policy obligations of the defunct Missouri State, including payment of death claims in full for a period of fifteen years, subject to certain restrictions and limitations therein expressed [R. 212]. The principal qualifications or limitation was the imposition of a policy lien upon all of the policies so assumed except certain policies specifically excluded therefrom, which lien was provided for in Section (c) of Article II, reading as follows:

> "Liens.—Inasmuch as the present appraised value of the assets purchased hereunder is less than the required reserves, a lien (adjusted to the nearest dollar) equal to 50% of the terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the Old Company, computed as of September 1, 1933, to the date to which premiums on such policies have been paid, will be established and placed against each such policy; provided, that in no case shall such lien exceed the amount by which said reserve shall be in excess of the indebtedness on any such policy as of September 1, 1933. Such lien shall bear interest at the rate of five per cent (5%) per annum from September 1, 1933, until September 1, 1948, and thereafter at the rate of four per cent (4%) per annum, such interest to be paid on each policy anniversary date, and if not so paid, to be compounded annually; and said lien and interest shall be treated otherwise in all respects and with like effect as policy loan indebtedness under the terms of such policy. Such lien and its accumulation shall be carried as an asset by the New Company with like effect and in like manner as policy loans. * * *

Every such lien, together with the interest thereon, will be deducted from any payment made by the New Company pursuant to the terms of each such policy or from any settlement made thereon or from the value used to purchase or provide any paid-up or extended insurance or to exercise any option provided by said policy, except that should the insured die before September 1, 1948, the New Company will, if the policy be then in force in accordance with its terms as modified by the terms of this Agreement, waive such lien in the payment of such death claim, subject, however, to the deduction of any accrued interest on the amount of such lien. The mortality cost of waiving such lien shall be provided out of the net earnings of the business of the Old Company purchased hereunder."

In the Purchase Agreement, including that portion of Section (c) Article II, quoted above, the Missouri State was referred to as the "Old Company."

It was further provided that the General American would keep a separate account of the business reinsured and the assets acquired which account would be kept on a record in the form of the statement required by the National Convention of Insurance Commissioners, which statement is commonly known as the Convention Blank [Art. V., R. 226-233].

For a period of fifteen years General American agreed to use the net earnings derived from the assets and business so acquired, to reduce the liens above provided, at periodical intervals. At the end of the fifteen year period the lien, if any then remained, would become permanent [Art. VII, R. 238-241]. There were other limitations and qualifications but such are not material here.

A policyholder desiring to continue his insurance under the terms and conditions set forth in the Purchase Agreement, could so elect by his failure to file a claim with the Circuit Court of the City of St. Louis, Missouri [R. 225].

At the time of insolvency, the Missouri State had over two hundred fifty thousand policies [R. 704] and a policy reserve liability of over 120 million dollars [Defendant's Exhibit B, in evidence, R. 590, at 596].

The General American upon the basis of reserves inquired for the death benefit and the coupon liability included in the policies assumed, as aforesaid, computed the lien on the policy of life insurance involved here, as being $1,054.00 [Defendant's Exhibit N, in evidence, R. 689; Exhibit, R. 689].

On March 20, 1934, the annual premium on the policy involved here became due, together with interest of $183.00 on an outstanding policy loan of $3,050.00 (loan having been made in January, 1933) and was not paid. [Agreed Statement, pars. 11 and 12, in evidence, R. 255-256.]

The policy of life insurance contained a provision for forfeiture in the event of nonpayment of premium, and the policy loan agreement provided for forfeiture for nonpayment of loan or interest where the loan equaled the then cash value [Plaintiff's Exhibit 3, R. 46; in evidence, R. 255].

Neither the premium in the sum of $936.00 nor the loan interest in the sum of $183.00 was ever actually paid and it is conceded that the policy was validly forfeited at the end of the grace period following the due date of March 20, 1934, unless petitioner has misconstrued the Purchase Agreement by establishing this lien to cover the policy

reserves including those reserves occasioned by coupon liability [R. 622].

On October 22, 1934, the policyholder, Louis Frederick Stephens died [Agreed Statement, par. 7, in evidence, R. 251] and thereafter on October 21, 1938, this suit was instituted as herein stated, the theory of plaintiff's action being that the General American was not authorized to impose a lien upon the coupon values as contained in the life insurance policy and that the full value of such coupons unencumbered by a lien, should have been used toward the payment and satisfaction of the indebtedness against said policy, or applied toward the purchase of extended insurance under said policy [Complaint, par. XI, R. 11, 12].

The cause was tried by the District Court without a jury, waiver thereof having been filed, which trial resulted in a judgment against petitioner in the amount of $9,942.34 plus interest [R. 127-128].

At the trial the Court refused to permit the introduction of exhibits and testimony on behalf of petitioner, which evidence, if admitted, would have shown that the Superintendent, the General American, and the Circuit Court of the City of St. Louis, Missouri, at the time of execution and approval of the Purchase Agreement hereinbefore described, construed the language

> "terminal reserve on each policy of life insurance * * * as such reserve has been established in the accounts of the Old Company"

as including the reserves made necessary by reason of the liability upon the coupons included in the life insurance policy and that such construction has been the uniform

construction adopted by the Superintendent and the General American since the date the Purchase Agreement was executed. Such construction is manifested by Defendant's Exhibits B, E, G, H, I and J, and the testimony offered in conjunction therewith. Defendant's Exhibit B [in evidence R. 590, Exhibit, R. 593-596] is the Superintendent's Report of Condition of Missouri State Life Insurance Company as of August 28, 1933. This evidence, while admitted, was rendered ineffectual by the Court's refusal of Exhibits H, I, and J. Defendant's Exhibit G [in evidence, except entries by General American, R. 617; exhibit, R. 618] contains entries made in the course of business as required by the lien provision (Art. II, Sec. (c)) of the Purchase Agreement, namely "Insurance Lien $1054.00. Int. pd. to 9/1/33 * * Coup. Res. 9-1-33 $1054.00." These entries were excluded [R. 615-616]. Defendant's Exhibit E [in evidence, R. 609, except entries by General American; exhibit R. 610] also contained an entry similarly excluded, namely "Acc. $1054.00 App'd to Ins. Lien.". The entry was excluded [R. 607]. Defendant's Exhibits (for identification) H [R. 626], I [R. 628] and J [R. 630], together with an Offer of Proof, were offered into evidence twice: first offer [R. 662-663] objections sustained [R. 664, 665], second offer [R. 710] objections sustained [R. 711]. These exhibits were the "accounts of the Old Company" specifically excluded under the rule of strict construction [R. 642-645].

Since liens imposed upon policies of the former defunct Missouri State are to be and have been reduced from the net earnings of the business and assets of that company, the additional liability upon the class of policies involved

here as created by the decision of the courts below, will reduce the funds now available and hereafter to be available for lien reduction purposes [Art. VII, R. 238-241].

Notwithstanding the fact that the Purchase Agreement was made between the Superintendent as representative of the over two hundred fifty thousand policyholders of the former Missouri State, and the General American, with the sanction and approval of the Circuit Court of the City of St. Louis, Missouri, the trial court held such evidence to be inadmissible and that the rule of strict construction required a finding against the petitioner on the question at issue [R. 642-645].

In due course and as required by law, petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit [R. 152-171, 743, 744-763].

In the Circuit Court two opinions have been rendered. In the first opinion (reported in 121 Fed. (2d) 218) the Court held:

> "In the first place the contract is not one shown to be drawn by the insurer without participation on behalf of the insured. We may properly assume that the insurance commissioner and the assuming company dealt at arms' length in framing the contract terms, including the lien provisions. Hence the rule as to interpretation of ambiguities against the insurer does not apply." [R. 778, Appendix pp. 11-12.]

and further that:

> "We have seen that until paid these coupons are 'credited to' the policy by its express terms. They are integral parts of the entire insurance contract. In making the contract for the assumption of the liability of the Old Company on its outstanding policies, it

> is obvious that the insurance commissioner would be as much concerned with the reserves to meet the coupons credited to the policy as to those to meet the credit of its cash surrender value." [R. 777-778, Appendix p. 11.]

and further held that the "rejected evidence shall be received" and that:

> "whatever the phrase 'terminal reserve on each policy' may mean when standing alone, it here includes any amount for coupon liability which is shown to have been established by computation on the company's accounts as a reserve for that purpose." [R. 782-783, Appendix p. 15.]

After rendering the above opinion a petition for rehearing was granted, and thereafter the Court rendered its second opinion (not yet reported) reversing itself and holding:

> "We are of the opinion, contrary to our former view, that the trial judge properly held that appellant's agreement is an insurance agreement to be strictly construed against appellant insurer." [R. 789, Appendix p. 20.]

and further that:

> "Applying the usual rule of construction against the insurer's own phraseology, we accept as a reasonable interpretation of the phrase 'terminal reserve on each policy of *life* insurance,' that it is the reserve on the 'life insurance' agreement only. It is such reserve so limited which appellant must show was 'established in the accounts' of the defunct company." [R. 791, Appendix p. 21.]

Thus the Court, relying upon the rule of strict construction, forbade the introduction of any evidence to show the mutual intent of the parties to the Purchase Agreement at the time it was executed, pursuant to the orders of the Circuit Court of the City of St. Louis, Missouri. This despite the fact that for more than five years prior to the filing of this suit [Oct. 21, 1942, R. p. 23] the parties to said agreement had been engaged in the performance thereof and that there was no evidence whatever of any dispute or difference or disagreement between said parties as to the reserve upon which the lien was established and notice of thereof given to all policyholders of the defunct company.

## Questions Presented.

1. Whether the provision of the Purchase Agreement imposing "a lien equal to 50% of the terminal reserve on each policy of life insurance * * * as such reserve has been established in the accounts of the Old Company" can be applied to the reserve on an entire policy so as to render the policy divisible and not entire, and thus impose the lien on a part of the policy reserve rather than on the entire policy reserve.

2. Whether evidence establishing that the parties to the Purchase Agreement understood at the time of its execution, that the lien imposed thereby on the reserve on each policy of life insurance applied to the entire reserve on a coupon policy, including the coupon reserve, was competent to prove the intention of the parties and assist the Court in correctly construing the contractual provision imposing liens on policy reserves.

3. Whether the rule of strict construction can be applied against petitioner as a party to the Purchase Agreement arrived at by negotiation with the Superintendent of the Insurance Department of the State of Missouri, and judicially approved by the Circuit Court of the City of St. Louis, Missouri, either as a rule of first or ultimate resort, and particularly whether the rule of strict construction may be applied against petitioner so as to exclude a consideration of evidence showing the uniform construction of the Purchase Agreement by the parties thereto, the circumstances surrounding the making of such agreement and its approval by the Circuit Court of the City of St. Louis, Missouri, and the evidence as to status of the accounts of the Old Company (Missouri State Life Insurance Company) which established a reserve liability including coupon reserves on all coupon policies.

## Reasons for Granting Writ.

The Circuit Court of Appeals has decided important questions of local law in conflict with applicable local decisions.

The Circuit Court of Appeals has decided important questions in conflict with decisions of other Circuit Court of Appeals.

## Conflict With Decisions of California.

The federal jurisdiction in this case derives from diversity of citizenship. Under *Erie R. Company v. Tompkins*, 304 U. S. 64, the law of California applies and should have been followed by the Circuit Court of Appeals.

(A) In its second opinion [Appendix] the Circuit Court of Appeals held the lien imposed by the Purchase

Agreement of petitioner [R. 791] in an amount "equal to 50% of the terminal reserve on each policy of life insurance" applied to part but not all of the reserve on a coupon policy, exempting from lien the reserve on the coupon liability. In so holding, it severed the coupon provision from the policy and ruled it a separate contract distinct from other policy provisions. In *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31, the Supreme Court of California held that a life insurance contract containing provisions for supplementary benefits, such as disability benefits, constitutes a single integral insurance policy to be dealt with as a whole. The decision of the Circuit Court of Appeals is in conflict with this California decision and fails to follow and apply California law.

The effect of the decision limiting the imposition of the lien to the so-called life insurance reserve transcends the immediate case and directly involves the rights of all policyholders, 250,000 in number, whose policies were assumed by petitioner under the Purchase Agreement.

(B) On another important question the second decision of the Circuit Court of Appeals is in conflict with applicable local decisions of California.

In its second decision, the Court in holding that the established lien extended to only a part instead of the entire policy reserve, applied the rule of strict construction against petitioner as a rule of first resort, and sustained the District Court in excluding evidence offered by petitioner of the intention and understanding of the parties to the Purchase Agreement at the time of its execution, that the lien imposed thereby on the reserve of each policy

of life insurance applied to the entire policy reserve, including coupon reserve.

This rejected evidence offered by petitioner to assist the Court in arriving at the true intentions of the parties, included Defendant's Exhibit H [R. 626], Exhibit I [R. 628] and Exhibit J [R. 630]. Petitioner offered to prove that a comparison of these exhibits with Defendant's Exhibit B [R. 593] would establish that the Superintendent of Insurance—one of the parties to the Purchase Agreement—had reported coupon reserves as an integrated part of reserves upon policies of life insurance of the Missouri State to which they were attached.

By portions of Defendant's Exhibit E [R. 610] and Exhibit G [R. 618], also excluded, petitioner offered to prove that General American—the other party to the Purchase Agreement—had also intended and understood that the reserve on a policy of life insurance was the entire reserve including the coupon reserve.

In applying the rule of strict construction to the Purchase Agreement as a rule of first resort, and in excluding evidence of the intention of the parties to the contract, and their construction of its terms, the second decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of California in the case of *Balfour v. Fresno Canal & Irrigation Company*, 41 Pac. 876, in which the California Supreme Court said:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversa-

> tion between and the declaration of the parties during the negotiations at and before the time of the execution of the contract may be shown."

and the Court held:

> "that the excluded evidence was of a character admissible to explain and fix the intention of the parties in the employment of the language used."

The decision of the California Supreme Court in the case of *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 141 Pac. 917, also sustained the rule that parol evidence is admissible,

> "* * * where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what was said."

The second decision of the Circuit Court of Appeals is also in conflict with the decision of the California Supreme Court in the case of *Mitau et al, v. Roddan, et al,* 84 Pac. 145, where the California Court held that:

> "The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions"

and with the decision of the California District Court of Appeal, First District, in the case of *Weaver et ux, v. Grunbaum, et al,* 87 Pac. (2d) 406, in which case it was held that:

> "Where the language of a contract is reasonably susceptible of more than one interpretation, evidence of the subsequent conduct of the parties thereunder is important in revealing to the Court the construction which the parties themselves placed upon it."

**Conflict With Decisions of Other Circuit Courts of Appeals.**

(A) The decision of the Circuit Court of Appeals severing the coupon provision from the policy and ruling it a separate contract distinct from other policy provisions is in conflict with decisions of other Circuit Courts of Appeals. The contract involved is a policy of life insurance. The coupon provision adds an investment feature, integrated with the life policy. The question whether incidental features of a contract may be considered separately or allowed to change the fundamental nature of the contract in which they are integrated has been answered in the negative, by the Circuit Court of Appeals for the Sixth Circuit in *In re Weick*, 2 Fed. (2d) 647, and in *Maskowitz v. Davis*, 68 Fed. (2d) 818 and by the Circuit Court of Appeals for the First Circuit in *Old Colony Trust Company v. Commissioner of Internal Revenue*, 102 Fed. (2d) 380; *In re Weick* holding that the endowment provision of a policy is merely incident to the life insurance; *Maskowitz v. Davis* holding that addition of cash and loan values and provision for extended insurance in a Pure Endowment Policy did not change its nature as an investment contract nor convert it into life insurance; and *Old Colony Trust Company v. Commissioner of Internal Revenue* holding that an annuity policy issued by the Sun Life Assurance Company did not become a policy of life insurance by the inclusion of an incidental provision for the payment of a benefit upon the contingency of death.

(B) On the question as to the exclusion of evidence showing the intention of the parties to the Purchase Agreement, the second decision of the Court of Appeals

is also in conflict with the decisions of other Circuit Courts of Appeals in the following cases, each of which held that where the meaning of contract language is doubtful or ambiguous, evidence of the intention of the parties at the time the contract was executed is competent to assist the court in correctly construing the contract:

*Corbett v. Winston Elkhorn Coal Co.*, 296 Fed. 577—Circuit Court of Appeals, Sixth Circuit;

*Markey et al. v. Brunson*, 286 Fed. 893—Circuit Court of Appeals, Fourth Circuit;

*Lovelace, et al, v. Southwestern Petroleum Co., et al*, 267 Fed. 513—Circuit Court of Appeals, Sixth Circuit;

*Western Battery & Supply Co. v. Hazelett Storage Battery Co.*, 61 Fed. (2d) 220—Circuit Court of Appeals, Eighth Circuit.

(C) In face of the fact that the Purchase Agreement is a negotiated reinsurance contract between petitioner and the Superintendent of the Insurance Department of Missouri, the Circuit Court of Appeals in its second decision held that the Purchase Agreement "is one for life insurance" [R. at 790] and that "the usual rule of construction against an insurer's own praseology" is applicable [R. at 791]. In thus applying the rule of strict construction the decision is in conflict with the following decisions of other Circuit Courts of Appeals:

*Bruckner-Mitchell v. Sun Indemnity Co.* (Dist. Ct. of App.), 82 Fed. (2d) 434;

*Alliance Life Ins. Co. v. Saliba* (C. C. A. 8), 87 (2d) 937;

*Stevens v. Life Assur. Soc.* (C. C. A. 7th), 101 Fed. (2d) 383, 390.

The above decisions hold that in negotiated contracts for reinsurance between companies, or between the liquidating agents of an insolvent company and the reinsuring company, the rule of strict construction should not be applied to resolve an ambiguity in the reinsurance agreement, but that the contract should be construed in the light of the circumstances surrounding the execution of the agreement and the construction adopted by the parties. As stated in *Stevens v. Life Assurance Soc.*, 101 Fed. (2d) 383, 390:

> "We do not believe that the circumstances under which the reinsurance contract was drafted and executed by the defendant and the receiver called for the application to it of the rule of construction that ambiguities of language be resolved against the insurer."

The importance of these questions, aside from a correction of the erroneous principles of law contained in the last decision of the Circuit Court of Appeals, derives from the great prominence reinsurance agreements of the type involved here have had in the transaction of the insurance business in the last several years, particularly since the collapse of the financial structure in 1929 and the dwindled assets of the early Thirties resulted in many of such court-sanctioned rehabilitation contracts,* and in the further fact that a construction of the language of such agreements does not merely involve the insurer and a

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*A few examples of similar contracts are found in the following cases: *Neblett v. Carpenter*, 305 U. S. 297; *Doty v. Love*, 295 U. S. 64; *Van Schaick v. National Surety Co.*, 239 App. Div. 490, affirmed 264 N. Y. 473; *Van Schaick v. Title & Mortgage Guarantee Co.*, 264 N. Y. 69; *Stevens v. Life Assur. Soc.*, 101 Fed. (2d) 383; *Alliance Life Ins. Co. v. Saliba* (C. C. A. 8th), 87 Fed. (2d) 937.

beneficiary, but the rights of thousands of other policyholders who must rely upon the earnings of such reinsuring companies for the entire elimination or a partial reduction of liens imposed upon them through the forces of adversity.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued directed to the Circuit Court of Appeals.

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**Certification.**

I, John T. Gose, as counsel for the petitioner herein do hereby certify that the above and foregoing petition which I have caused to be prepared is in my judgment well founded and that it is not interposed for delay.

Dated: October ....., 1942.

JOHN T. GOSE.